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No. 02-836

In the Supreme Court of the United States

DONALD W. STEARNS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

NCR CORPORATION AND NCR PRE-65 RETIREE HEALTH CARE PLAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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The core legal issue in this case has always been the legal effect of a free-standing fully integrated severance agreement that, in significant part, confers health benefits. More specifically, how does the judiciary construe a severance agreement that is unrecognizable from a bilateral contract where the consideration that is the basis of the agreement is for a specified level of benefits?

This is not simply an esoteric inquiry, as much resolves depending upon how the question is answered. If the inclusion of health benefits requires that the contract be viewed as a plan, then:

- the plan itself is an independent legal entity, and can sue and be sued;[1]

- the plan is interpreted to ascertain the settlor's (in this case, NCR's) intent;[2]

- in divining NCR's intent, courts are free to consider documents such as NCR's Board of Directors minutes[3] that were neither a part of the severance agreement nor referenced within its four corners; and

- assuming the correct verbiage is used, the plan administrator's interpretation

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[1] 29 U.S.C. §1132(d)(1).

[2] See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112 (1989) (Indicating the importance of the intent of the settler in interpreting terms of trusts).

[3] E.g., NCR Brf. Opposing Cert. at 11 n.5.

of the severance agreement is afforded significant deference.[4]

If, however, the severance agreement is construed as a federal common law contract, then

- the written promises represent the memorialization of binding promises, but are not – unlike an ERISA plan – a distinct legal entity;

- the document is interpreted to ascertain the intent of both parties;[5] and

- the contract will be evaluated "under general contract principles, without giving special weight to the intent of either party."[6]

The Trial Court construed the severance agreement as a contract. Applying federal common law, the Trial Court found the terms were ambiguous and its interpretation was unaided through its review of extrinsic evidence, requiring it to construe the ambiguities against the drafter, NCR.

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[4] E.g., Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989) (For actions challenging benefit eligibility determinations, "a deferential standard of review [is] appropriate when a trustee exercises discretionary powers.").

[5] E.g., Tymshare, Inc. v. Covell, 727 F.2d 1145, 1153 (U.S. App. D.C. 1984) (Scalia, J.) ("[T]he fundamental principle . . . [is] that which the intent of the parties was in making the contract must control . . .") (internal quote marks and citation omitted).

[6] Bock v. Computer Assoc. Intern., Inc., 257 F.3d 700, 705 (7th Cir. 2001).

The *Stearns* panel took a different approach. The severance agreement terms that included health benefits demanded, in its view, that it consider the severance agreement an ERISA plan, and it thus interpreted the agreement using plan enforcement rules of construction.

As discussed in the opening petition, the *Stearns* panel's decision created a conflict among the circuits, most notably with the Seventh.

To prop up the *Stearns* panel decision, NCR makes a number of simply incorrect claims.

Most prominent is NCR's complaint that Stearns has missed the issues "actually presented."[7] NCR argues that the *Stearns* panel did not hold that a contract claim for benefits was not cognizable. But there is no way to paper over the *Stearns* panel analysis, which held: "The claim is of course contractual in nature, but the district court erred in looking beyond ERISA plan interpretation principles by splitting plaintiffs' single ERISA claim into distinct ERISA and breach-of-contract components."[8] In other words: Stearns has a single claim for plan benefits, and the Trial Court, and Stearns, were incorrect in attempting to enforce the severance agreement through federal common law contract principles. Stearns has correctly stated the key issue presented by the *Stearns* panel decision.

NCR also scolds Stearns for "mak[ing] no reference whatsoever to NCR's written reservation of the rights to

[7] NCR Brf. Opposing Cert. at i.

[8] Stearns v. NCR Corp., 297 F.3d 706, 711 (8th Cir. 2002).

amend or terminate any health-care benefit provided to its active and retired employees . . .."[9]

In fact, Stearns discussed the reservation on page 4 of his petition. So too, the reservation, incorporated only through a footnote in the severance agreement that suggested "[y]our (sic) should refer to our Group Benefits booklet . . . for the details of the NCR Health Care Plans," makes *no reference whatsoever* to the two health programs – "Option One" or Choice 2" – that were the subject of the severance agreement. This inconvenient fact is unmentioned by NCR and unresolved by the *Stearns* panel. It did not, however, elude the Trial Court: "In order to understand the disclaimer applied, Early Out Program participants would have had to refer to the entire 1993 Plan booklet and surmise indirectly that the disclaimer extended to the enhanced benefits promised under the contract simply because basic descriptions of the Option One, Choice 2 and the Supplement to Medicare plan are outlined in the same booklet."[10]

Finally, NCR elevates its preferred extrinsic evidence beyond all reckoning. The same evidence (except for the purported failure to object,[11] which was never presented) was before the Trial Court, which found it unpersuasive.[12] Observed a different federal court, in construing a parallel claim (though it involved a different set of retirees, and a different severance agreement): "NCR can no more rely upon oral statements to enforce ERISA welfare plan rules than can Plaintiffs to assert welfare plan rights. In fact, even if videotape statements are not to be regarded as oral statements,

[9] NCR Brf. Opposing Cert. at 1.

[10] Stearns v. NCR Corp., 97 F. Supp.2d 954, 965-66 (D. Min. 2000).

[11] NCR Brf. Opposing Cert. at 7.

[12] 97 F. Supp.2d at 966-67.

U.S. Group employees were not required to view the videotape as part of their early retirement agreement, and it would be unfair to hold them accountable for not doing so."[13]

NCR's severance agreement is cognizable and enforceable as a contract. The *Stearns* panel erred by applying plan interpretation principles, and its decision should be reversed.

Respectfully submitted,

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[13] Richmond v. NCR Corp., 227 F. Supp.2d 802, 813 (S.D. Ohio 2002).